1986

The State of Utah v. Myron A. Hamilton : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
-v-	:	
MYRON A. HAMILTON	:	Case No. 20646
Defendant/Appellant	:	Category No. 2

REPLY BRIEF OF APPELLANT

Appeal from affirmance in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding: of convictions of Failure to Respond to an Officer's Signal to Stop, a Class A Misdemeanor, Failure to Obey a Police Officer, a Class B Misdemeanor; Speeding and No Driver's License on Person; in the Circuit Court, State of Utah, Salt Lake County, Sandy Department, the Honorable C. Bailey Sainsbury, Judge, presiding.

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The Statement of the Case and Statement of Facts are as set forth previously in Appellant's Brief at 1-4. (See also Respondent's Brief at 1-7). The Appellant takes this opportunity to reply to the Respondent's Brief.

ARGUMENT

POINT I
(Reply to Respondent's Point I)

AN ADEQUATE RECORD HAS BEEN PROVIDED TO SUPPORT APPELLANT'S CONTENTIONS AND TO ENABLE THIS COURT TO DECIDE THIS CASE.

The record in this case is massive for a non-felony criminal case. However, despite earnest efforts, defense counsel's office was unable to locate the tapes of the circuit court trial in this case. (Appellant's Brief at 3 n. 1). These tapes were apparently the only portion of the extensive proceedings in both the circuit and district courts which was not provided to this Court.

In spite of this and the fact that the State was able to locate (and presumably listen to) the missing tapes, the State still complains that the Appellant has supplied an inadequate record. (Respondent's Brief at 8-9 and 9, n.1). However, as will be demonstrated below, this complaint is invalid.

First, if an inadequacy of the record does exist, it affects only the trial stage of the proceedings which occurred in the circuit court. The complete record of the first appellate stage of the proceedings, which occurred in the district court, is before this Court. Therefore, Mr. Hamilton's contention that he was denied assistance of appellate counsel in the district court is untarnished by any inadequacy of the record claimed by the State.

However, the Appellant contends that the record from the circuit court proceedings is adequate. To support this contention, one need look no further than the State's brief. That brief contains a detailed chronological description of the proceedings in this case which was gleaned from the available record. (Respondent's Brief at 3-7). Further, the State's brief cites with great specificity particular instances in the existent record which the State claims support its substantive allegations of propriety of the proceedings. (See, for example, Respondent's Brief at 11-21). Finally, the State concludes one of its points by declaring that "although defendant did not provide an adequate record of the entire court proceedings nor a transcript of the trial, it is, however, clear from the documents before this Court that . . . [the

proceedings below were proper.] (Respondent's Brief at 17). Indeed, the State's own substantive argument seems to undermine its claim that the record is inadequate.

Further, as the record extant clearly shows, Mr. Hamilton was denied (and did not waive) assistance of counsel not only at trial but at critical pre-trial proceedings in the circuit court. (R.468, 469, 470-471, 484, 493, 514-516, January 11, 1984 transcript). The right to assistance of counsel attaches to all critical stages of a criminal proceeding, not just to the actual trial. Hamilton v. Alabama, 368 U.S. 52 (1961), Coleman v. Alabama, 399 U.S.1 (1970). In Powell v. Alabama, 287 U.S. 45, 69 (1932), the United States Supreme Court stated that an accused "requires the guiding hand of counsel at every step in the proceedings against him." Clearly, the record establishes that Mr. Hamilton was deprived of the "guiding hand of counsel at every step in the proceedings against him" in the circuit court. Even if the record is inadequate with respect to the trial itself, the record is adequate with respect to other proceedings in the circuit court.

POINT II
(Reply to Respondent's Points II, III, and IV)

THE TRIAL COURT ERRED IN FAILING TO APPOINT AN ATTORNEY TO REPRESENT THE APPELLANT AND IN NOT OBTAINING A WAIVER OF THE RIGHT TO COUNSEL.

In his opening brief, Appellant raised two issues, both of which concerned the denial of the right of assistance of counsel.

The first issue concerned the denial of assistance of counsel at the trial level in the circuit court. (Appellant's Brief at 6-11). In response to this contention, the State advances three claims: (1) that the Defendant voluntarily, knowingly, and intelligently waived his right to counsel (Respondent's Brief, Point II, at 9-17); (2) that the trial court properly found a waiver (Respondent's Brief, Point III, at 17-22); and (3) that the district court properly addressed the issue on appeal (Respondent's Brief, Point IV, at 22-25). The facts of the case, as well as the case law, simply do not support the conclusions reached by the State.

With respect to the issues concerning Mr. Hamilton's supposed waiver of his right to assistance of counsel, the State sites numerous instances in which it declares that Mr. Hamilton knew he was waiving his right to counsel in the circuit court. The State concludes that the "totality of circumstances" demonstrate such a waiver. (Respondent's Brief at 21-22). The simple fact remains, however, that the State can point to no instance in the record where the trial judge asked Mr. Hamilton if he was waiving his right to counsel. The State cannot even cite to an instance where the trial judge warned Mr. Hamilton that his continued handling of the case without either procuring or requesting counsel would be deemed a waiver of the right to counsel. The State cannot cite such instances because they did not occur. The State declares that the trial court "could only beg defendant to get counsel." (Respondent's Brief at 17). However, the State does not provide any citation to the record where such "begging" occurred. Indeed, the State is left to conclude that "Any lack of record of extensive

waiver questioning given the defendant's obvious intent and displeasure at being questioned, was certainly harmless error." (Respondent's Brief at 22). In fact, virtually no questioning occurred which directly concerned waiver.

The State further complains that waiver should be inferred because of Mr. Hamilton's obstinance and bad faith. However, such obstinance cannot outweigh the responsibility that such a situation places on a trial judge.

Several cases have discussed waiver of the right to counsel, and from these cases, it is possible to define the parameters of a constitutionally acceptable waiver. A finding of waiver is a requirement in right to counsel cases. The necessity of a finding that such a waiver has been made was decreed in Johnson v. Zerbst, 304 U.S. 458 (1938). Besides requiring that a waiver to right to counsel be "knowingly and intelligently" made, the Court in that case stated:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiscence in the loss of fundamental rights." . . . The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. Id. at 464, 465 (emphasis added).

In extending this protection to state criminal matters the Court in Carnley v. Cochran, 369 U.S. 506 (1962) stated that the evidence must show that the defendant was informed specifically of his right to the assistance of appointed or retained counsel and that he clearly rejected such assistance. No amount of circumstantial evidence that the person may have been aware of his right to counsel and intended to relinquish it will suffice. Miranda v. Arizona, 384 U.S. 436, 471-2 (1966).

Further, an adequate waiver of right to counsel which results in an accused representing himself has additional requirements. In those cases, the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta v. California, 422 U.S. 806, 835 (1975).

Finally, in Carnley v. Cochran, the Court stated: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. at 516. The Utah Supreme Court has adopted the position that waiver will not be presumed from a silent record when important constitutional rights are at stake. Chess v. Smith, 617 P.2d 341 at 345 (Utah 1980) and State v. Cook, 26 Utah Adv. Rep. 21 at 22 (1986).

With respect to the State's claim that the district court properly addressed the issue of denial of counsel at trial on appeal, the issue is tainted by the district court's failure to appoint counsel for Mr. Hamilton's appeal to that court. (See, Point III, infra).

Appellant's opening brief contends that the issue of right to counsel was properly before the district court. (Appellant's Brief at 10-11). In any event, the district court did not address denial of the right to counsel in its decision.

Finally, this Court need not even address the issue of denial of assistance of counsel at the trial level. As contended in Point III, below, and in Appellant's opening brief, Mr. Hamilton was unrepresented in his appeal to the district court. If this Court determines that this denial constituted error, remand to the district court for re-preparation and reconsideration of the original appeal (with the assistance of counsel) would be an appropriate remedy.

POINT III

THE DISTRICT COURT ERRED IN FAILING TO APPOINT COUNSEL FOR MR. HAMILTON ON THE FIRST APPEAL.

In his opening brief, Appellant argued that he was denied the assistance of counsel on his first appeal to the district court; furthermore, no waiver of the right to counsel was found by the district court. (Appellant's Brief at 11-14). The State does not respond to this issue in its brief.

The right of appeal is a constitutional right in the State of Utah. Article I, section 12 of the Constitution of Utah gives the accused the right to appeal in all cases. Utah Code Ann. §77-32-1 (1953, as amended) guarantees the constitutional right of appeal for indigent defendants. Furthermore, the same provision guarantees the right to representation by an attorney in the prosecution of the first appeal of right.

In Evitts v. Lucey, 83 L.Ed.2d 821, 827 (1985) the Supreme Court stated:

> Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. (citations omitted).

The Court stated that the Constitution demanded that the defendant be afforded the representation of counsel in pursuing an appeal. The Court delineated the reason for the necessity of the assistance of counsel during the appeal process:

> To prosecute the appeal, a criminal appellant must face an adversary proceeding that-like a trial-is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant-like an unrepresented defendant at trial - is unable to protect the vital interests at stake. Id. at 830.

The right to assistance of appellate counsel may be waived. However, as the Court of Appeals of New Mexico noted in State v. Lewis, 719 P.2d 445 (N.M. App. 1986), the criteria for determining waiver of appellate counsel are stringent. In Lewis, the court stated:

> Consideration of an appellant's request to act as his own counsel on appeal necessarily involves: (1)alerting defendant to the hazards of serving as his own attorney and the difficulties and complexities of the appellate process; and (2)instructing defendant that he will be bound to follow all applicable appellate rules, just as any other appellant represented by counsel.

Id. at 448. After declaring that these admonitions must appear on the record, the court further declared that the record must reflect "whether defendant has knowingly, intelligently and competently elected to dispense with appellate counsel." Id. (citations omitted). Finally, the New Mexico court stated that in the absence of such an on-the-record waiver, the appellate court "will indulge every reasonable presumption against waiver . . . ." Id. Indeed, the court held that the right to assistance of appellate counsel remains "until it is affirmatively shown in the record" that the right has been waived. Id. at 447.

In the present case, Mr. Hamilton appealed his circuit court convictions to the district court (R.352-358). However, the entire appeal process apparently transpired solely on paper. The record reveals no personal appearance by either party before the district court. Furthermore, the record reveals no instance in which Mr. Hamilton was questioned concerning his ability to afford an attorney for the appeal process or admonished about the hazards of bringing his own appeal. The record is silent with respect to a waiver of right to assistance of appellate counsel. Mr. Hamilton was never informed of the availability of appointed counsel and proceeded through the appellate process without assistance of counsel. These facts are unchallenged by the State. Also unchallenged by the State is Appellant's contention that failure to

provide an attorney on appeal (or, at least, attain a waiver of the right to representation) deprived him of a fair review of his circuit court conviction.

CONCLUSION

For the foregoing reasons, the appellant, Myron Hamilton, seeks reversal of his convictions and remand of his case to the circuit court with an order for a new trial with the assistance of counsel. In the alternative, the appellant seeks reversal of the district court decision on his appeal of right and remand of his case to the district court with an order permitting a new appeal at the district court level with the assistance of counsel.

Respectfully submitted this 29th day of August, 1986.

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CERTIFICATE OF SERVICE

I, CURTIS C. NESSET, hereby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 29th day of August, 1986.

Curtis C. Nesset
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DELIVERED by _____ this ____ day of August, 1986.